No. 17-1227

In The
Supreme Court of the United States

ALIGN CORPORATION LIMITED,

Petitioner,

v.

ALLISTER MARK BOUSTRED, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Colorado

BRIEF IN OPPOSITION OF RESPONDENT HORIZON HOBBY, INC.

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257 to review an interlocutory state court ruling on a motion to dismiss related to personal jurisdiction, which was remanded for further proceedings and expressly allows the Petitioner to renew its challenge to personal jurisdiction when the burden is greater on the plaintiff?

2. Whether Petitioner has presented a compelling reason to grant the Petition where the trial court determined on a motion to dismiss that the plaintiff made a prima facie showing that the manufacturer injected a substantial number of products into the stream-of-commerce knowing that those products would reach the forum state and the manufacturer took steps to market its products in the U.S. and the forum state.

CORPORATE DISCLOSURE STATEMENT

Horizon Hobby, Inc., now known as Horizon Hobby, LLC's ("Horizon") parent corporation is HHI Group, LLC. No publicly held company owns a 10% or more interest in Horizon.

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INTRODUCTION

Petitioner Align Corporation Limited ("Petitioner") is a Taiwanese corporation that sells radio control hobby products throughout the world through a series of worldwide distributors. During all relevant times Petitioner sold products throughout the U.S., including the State of Colorado, through four U.S.-based distributors, one of which was Respondent Horizon Hobby ("Horizon"). Now Petitioner asks this Court to grant certiorari to give it what would amount to immunity from suit in every jurisdiction in the U.S. The Court should deny certiorari for four reasons: (1) the state court decision below is not final, leaving this Court without jurisdiction; (2) the procedural posture of the state court action and the incomplete record make this case a poor candidate for determining widespread issues of personal jurisdiction; (3) the case is a poor candidate because the allegations and documentation submitted to the trial court supported a prima facie showing of jurisdiction, even under the more stringent stream-of-commerce plus test; and (4) the Colorado Supreme Court's decision does not conflict with the decisions of this Court.

The first flaw in the Petition is a fatal jurisdictional defect. Congress limits this Court's jurisdiction over state court decisions to those that are final. 28 U.S.C. § 1257. The decision here is not final in two respects: (1) it is an interlocutory jurisdictional ruling, leaving countless issues of law still to be litigated in state court; and (2) it is not a final ruling even as to personal jurisdiction because the Colorado Supreme

Court specifically stated that although the showing made at the trial court level was sufficient to survive Petitioner's motion to dismiss, as the case proceeds, the plaintiff may have to meet a higher burden to definitively establish that Colorado may exercise jurisdiction over Petitioner. Although this Court has adopted some exceptions to the finality rule, none of them apply here.

The second reason to deny the Petition is that the procedural posture of the state court action and the limited discovery at the trial court level make this case a poor candidate for determining widespread issues of personal jurisdiction. The appeal of this case concerns the trial court's denial of Petitioner's motion to dismiss under Colo. R. Civ. P. 12(b)(2) (lack of jurisdiction over the person). At the trial court level, because of the very low burden for defeating a jurisdictional defense on a motion to dismiss, the parties conducted very limited jurisdictional discovery, which included no discovery directly on Petitioner, and the factual record is therefore very sparse. Moreover, because the trial court's ruling concerned a motion to dismiss determined on documentary evidence, the plaintiff needed only to make a prima facie showing of personal jurisdiction to defeat the motion. The Colorado Supreme Court's decision determined only that the plaintiff made this prima facie showing based on the limited factual record before it.

The third reason to deny the Petition is the allegations and documentation submitted to the trial court supported a prima facie showing of jurisdiction, even

under the more stringent stream-of-commerce plus test argued for by Petitioner. Thus, even if this Court determines the Colorado Supreme Court was wrong to adopt the pure stream-of-commerce test, the outcome will remain unchanged, and the Court's opinion will essentially be an advisory opinion.

Finally, the decision below presents no conflict with any decision of this Court. Petitioner claims that the decision conflicts with the Court's recent rulings on personal jurisdiction. However, the decision cites and relies on all this Court's seminal decisions on personal jurisdiction in product liability matters, while grounding its reasoning in longstanding precedent from this Court.

The Court should deny the Petition.

STATEMENT OF THE CASE

I. Background

Petitioner is a Taiwanese corporation that sells radio control hobby products throughout the world through a series of worldwide distributors. During all relevant times Petitioner sold products throughout the U.S., including the State of Colorado, through four U.S.-based distributors, one of which was Respondent Horizon.

This is a product liability case in which Respondent Allister Mark Boustred, M.D. ("Dr. Boustred"), alleges he was severely injured when a replacement part

of a radio control helicopter broke, resulting in part of the blade of the helicopter striking him in the eye. Dr. Boustred alleges that the cause of his injuries was a design or manufacturing defect in the plastic material of the replacement part. More particularly, Dr. Boustred claims Petitioner manufactured the replacement part with air pockets or voids in the plastic/polymer that weakened the part and caused it to fracture, which in turn caused Plaintiff's injury. It is undisputed that Petitioner designed, manufactured, packaged, and sold both the helicopter and the replacement part.

II. Procedural History

Dr. Boustred originally asserted claims in Colorado state court against Petitioner and several U.S. distributors, including Horizon (the others were later dismissed), under theories of strict liability and negligence. After being served in Taiwan, Petitioner immediately moved to dismiss the claims against it, under Colo. R. Civ. P. 12(b)(2).

The trial court granted Horizon an additional 65 days to respond to Petitioner's motion to dismiss, to conduct limited discovery, including the depositions of two other distributors of Petitioner, both headquartered in California. Horizon sought discovery from the other distributors to rebut Petitioner's contention that it had insufficient contacts with the U.S. and Colorado. Following the limited discovery, Dr. Boustred and

Horizon filed responses to Petitioner's motion to dismiss.

The trial court denied Petitioner's motion to dismiss, ruling that under Colorado law, because the motion to dismiss was determined on documentary evidence, Dr. Boustred needed only to make a prima facie showing that personal jurisdiction was proper to defeat the motion to dismiss. Pet. App. 48. The trial court accepted the uncontroverted assertions contained in the complaint as true, and resolved otherwise disputed issues in the plaintiff's favor. Pet. App. 48. The trial court ultimately ruled that Dr. Boustred had made a prima facie showing of jurisdiction under the Colorado long-arm statute and the U.S. Constitution, ruling that Dr. Boustred's allegations and supporting documents showed that Petitioner injected a substantial number of products into the stream-of-commerce knowing that those products would reach Colorado *and* that Petitioner took steps to market its products in the U.S. and Colorado. Pet. App. 52-53.

Petitioner then requested the trial court certify the order denying the motion to dismiss for interlocutory appeal under Rule 4.2 of the Colorado Appellate Rules. The trial court granted the certification request and the Colorado Court of Appeals accepted jurisdiction. Pet. App. 40-45. The Colorado Court of Appeals, in a unanimous decision, affirmed the trial court's ruling, holding under *Marks v. U.S.*, 430 U.S. 188 (1977), it was compelled to follow the narrowest of the Supreme Court's decisions on stream-of-commerce jurisdiction: Justice Breyer's concurrence in *J. McIntyre Machinery,*

Ltd. v. Nicastro, 564 U.S. 873 (2011) and Justice Brennan's concurrence in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987). Under those rulings, the Court of Appeals held it was compelled to apply this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), as it remains the prevailing decision articulating the stream-of-commerce theory. Pet. App. 36. The Colorado Court of Appeals further held Dr. Boustred made a prima facie showing of jurisdiction over Petitioner under *World-Wide Volkswagen* and the stream-of-commerce theory of jurisdiction. Pet. App. 36-39.[1]

Petitioner appealed to the Colorado Supreme Court, which affirmed. Pet App. 23. The Colorado Supreme Court, in a unanimous decision, agreed that it was bound by the concurring decisions in *Asahi* and *J. McIntyre*, both of which adopted the stream-of-commerce test set forth in *World-Wide Volkswagen*. Pet. App. 16-17. The Colorado Supreme Court therefore held:

> To make a prima facie showing [of personal jurisdiction] under *World-Wide Volkswagen*, a plaintiff must allege sufficient facts to support a reasonable inference that a defendant placed goods into the stream-of-commerce with the expectation that the products will be purchased in the forum state.

Pet. App. 19.

[1] The Colorado Court of Appeals determined that it did not need to address whether the trial court applied the more stringent stream-of-commerce plus test because the Court of Appeals adopted the stream-of-commerce test from *World-Wide Volkswagen*. Pet. App. 35-36 n.2.

The Colorado Supreme Court held that Dr. Boustred had carried his burden to make such a prima facie showing, as he had alleged and shown with documentation obtained through limited discovery:

- Petitioner manufactured the subject radio-controlled helicopter and subject allegedly defective main rotor holder in Taiwan where the company is based;
- Petitioner sells its products via an international distributorship network that includes four distributors in the United States, one of which is Horizon;
- The rotor holder at issue here was distributed by Horizon and purchased in Colorado; Horizon has sold over $350,000 worth of Petitioner's products in Colorado;
- Petitioner placed no limitations on where Horizon could distribute products in the United States;
- Petitioner's products are sold throughout the United States, including Colorado;
- All four U.S. distributors have distributed Petitioner's products in Colorado;
- All four distributors are promoted and advertised by Petitioner, and in particular on Petitioner's website;
- Petitioner provided marketing materials to all of its U.S. distributors;

- Petitioner attended trade shows in the U.S. where it actively marketed its products; and
- Petitioner established channels through which consumers could receive assistance with Petitioner's products.

Pet. App. 19-20. The Colorado Supreme Court ultimately determined that under the applicable precedent of this Court and the allegations and evidence submitted to the trial court, Dr. Boustred made a prima facie showing of jurisdiction over Petitioner and it affirmed the judgment of the Colorado Court of Appeals. Pet. App. 20-21, 23.

REASONS THE COURT SHOULD DENY THE PETITION

I. This Court Lacks Jurisdiction Because the State Court's Decision is Not Final

This Court lacks jurisdiction to grant the writ because the state court decision is not a final judgment or decree as required by 28 U.S.C. § 1257.[2] The decision merely holds that Dr. Boustred made a prima facie showing of jurisdiction sufficient to survive Petitioner's motion to dismiss. In fact, the Colorado Supreme Court

[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question. . . ."

specifically noted that the decision was only based on the showing required to survive a motion to dismiss:

> We note, however, that this showing only allows Boustred to survive Align's motion to dismiss. As the case proceeds, Boustred may have to meet a higher burden to definitively establish that Colorado may exercise jurisdiction over Align. *See Goettman*, 176 P.3d at 66 n.3 ("Although a prima facie showing of personal jurisdiction [over a non-resident defendant] is sufficient to overcome a motion to dismiss for lack of jurisdiction when the court rules on the motion on documentary evidence alone, the plaintiff must establish personal jurisdiction by a preponderance of the evidence if the defendant raises the challenge again prior to the close of trial.").

Pet. App. 21 n.5. The decision is therefore not final as to jurisdiction, and none of the exceptions to the finality requirement apply here.

A. The Court's Jurisdiction is Limited to Review of Final State Court Decisions

The finality requirement of 28 U.S.C. § 1257 limits the Court's review to final state court judgments. "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Jefferson v. City of*

Tarrant, Ala., 522 U.S. 75, 81 (1997) (quoting *Market Street R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). Finality serves to "avoid[] piecemeal review of state court decisions," to "avoid[] giving advisory opinions in cases," and to "limit[] review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *N.D. State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

The finality requirement is especially critical "when the jurisdiction of this Court is invoked to upset the decision of a State court." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In such cases, the Court is:

> [I]n the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree.' § 237 of the Judicial Code, 28 U.S.C. § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

Id.

B. The Colorado Supreme Court has not Issued a Final Judgment or Decree

The Colorado Supreme Court's decision is not final in at least two respects. First, it is not "an effective determination of the litigation" but rather is "of merely interlocutory or intermediate steps therein." *See Jefferson*, 522 U.S. at 81. Similar to the circumstances present in *Jefferson*, the Colorado Supreme Court's decision here did not terminate the litigation, but merely answered a single certified question. *See id.*; Pet. App. 3. In fact, the underlying litigation is not even at issue, as Petitioner has not yet filed an answer. Following Petitioner's answer, the parties will continue with discovery, dispositive motions, and trial. "Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits. . . ." *Jefferson*, 522 U.S. at 81. The Colorado Supreme Court's decision is therefore not a final judgment and does not meet the first test in *Jefferson*.

Second, the decision below does not finally resolve whether Petitioner is subject to personal jurisdiction in Colorado's courts because the issue is subject to "further review or correction." *See id.* Because the motion to dismiss was determined on documentary evidence, Dr. Boustred needed only to make a prima facie showing that personal jurisdiction was proper to defeat the motion to dismiss, and the trial court accepted the uncontroverted assertions contained in the complaint as true, and resolved otherwise disputed issues in the plaintiff's favor. Pet. App. 48. Dr. Boustred made the necessary prima facie showing. However, the Colorado

Supreme Court noted that "this showing only allows Boustred to survive Align's motion to dismiss. As the case proceeds, Boustred may have to meet a higher burden to definitively establish that Colorado may exercise jurisdiction over Align." Pet. App. 21 n.5. Thus, not only is there not a final judgment in the state court proceeding, the issue of personal jurisdiction has not finally been determined.

C. The Case does not Fit the Exceptions to the Finality Rule Identified in *Cox Broadcasting Corp.*

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court summarized four categories of cases where a state court decision subject to further state court proceedings is considered a final judgment on a federal issue for jurisdictional purposes under 28 U.S.C. § 1257. Petitioner cites *Cox Broadcasting Corp.* for the proposition that the issue of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment is not subject to further review in the Colorado courts, which, as demonstrated above, is not accurate. Pet. 1. Although Petitioner does not address the finality problem in the Petition, it is clear that none of the *Cox* exceptions applies here.

1. The first *Cox* exception concerns cases where "further proceedings – even entire trials – [are] yet to occur in the state courts but where . . . the federal issue is conclusive or the outcome of further proceedings preordained," such that "the case is for all

practical purposes concluded." *Cox*, 420 U.S. at 479. For this exception, the *Cox* Court cited *Mills v. Alabama*, 384 U.S. 214 (1966), in which the state supreme court had rejected the petitioner's only defense and remanded for a trial, to which the petitioner could not prevail without the defense. The outcome was therefore "preordained." *See id.* (citing *Mills*, 384 U.S. at 217-18). In contrast, the Colorado Supreme Court's decision does not render the outcome of the case "preordained." In fact, the Colorado Supreme Court left open the possibility that the personal jurisdiction defense may be raised at a later time in the case, for which the burden may be higher on Dr. Boustred than it was on the motion to dismiss under Colo. R. Civ. P. 12(b)(5). *See* Pet. App. 21 n.5. Petitioner will likely raise several other defenses to Dr. Boustred's claims, further distinguishing this case from *Mills*. Therefore, the first *Cox* exception does not apply.

2. The second *Cox* exception is where federal issues are "finally decided by the highest court in the State" but the issue "will survive and require decision regardless of the outcome of future state court proceedings." *Cox*, 420 U.S. at 480. Again, this exception does not apply because Petitioner may prevail in the trial court on the personal jurisdiction issue later in the case or may prevail on the merits of Dr. Boustred's claims. Therefore, the issue of the trial court's denial of Petitioner's motion to dismiss under Colo. R. Civ. P. 12(b)(5) (in which Dr. Boustred needed only to make a prima facie showing of jurisdiction) will not necessarily require a decision regardless of the outcome of future

state court proceedings. Thus, the second *Cox* exception does not apply.

3. The third *Cox* exception concerns cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. This occurs in cases where "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id.* To illustrate this exception, the *Cox* Court cites *California v. Stewart*, 384 U.S. 436 (1966), which involved a state court decision that reversed a conviction on constitutional grounds and remanded for retrial. *Id.* The *Stewart* Court held that this state court decision on the constitutional issue "was 'final' since an acquittal of the defendant at trial would preclude, under state law, an appeal by the State." *Id.* (citing *Stewart*, 384 U.S. at 498 n.71). These circumstances are not present here. If Dr. Boustred prevails on personal jurisdiction later in the case (when the burden on Dr. Boustred is higher), Petitioner can raise the issue following that determination, even if Dr. Boustred ultimately prevails on the merits. If Petitioner ultimately prevails on personal jurisdiction in state court, Dr. Boustred or Horizon can appeal that determination.

4. The fourth *Cox* exception concerns cases:

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83. This exception has no application here for three reasons.

First, as shown above, the state court has not "finally decided" the federal issue of personal jurisdiction. Rather, the trial court, Colorado Court of Appeals, and Colorado Supreme Court only held Dr. Boustred made a prima facie showing of personal jurisdiction sufficient to withstand Petitioner's motion to dismiss, and the Supreme Court specifically held that Petitioner can renew its motion at any time prior to the end of trial. Pet. App. 21 n.5, 37, 53.

Second, the Court's review would not be "preclusive of any further litigation" for similar reasons to those present in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). In *Nike*, the Court determined that a state court decision addressing a First Amendment defense was not final because the Court's decision would not have necessarily ended the litigation. Similarly, here, review of the personal jurisdiction issue will not preclude further litigation. In fact, even if this Court grants certiorari and accepts Petitioner's argument that the stream-of-commerce plus test should apply, the trial court's ruling would be unchanged because the allegations and documentation submitted to the trial court met both the pure stream-of-commerce test as well as the more stringent stream-of-commerce plus test:

> Mr. Boustred's allegations and supporting documents show that Align injected a substantial number of products into the stream-of-commerce knowing that those products would reach Colorado. *Additionally*, Align allegedly took steps to market its products in the U.S. and Colorado.

Pet. App. 52-53 (emphasis supplied). Thus, review would merely result in an advisory ruling and would not be preclusive of any further litigation.

Third, refusal to review the state court decision immediately would not seriously erode federal policy. No federal policy requires review of personal jurisdiction issues at the pleading stage, especially considering the parties have been without the benefit of discovery on Petitioner. This situation is a far cry from a

case like *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984), in which the Court reviewed a state court ruling that the Federal Arbitration Act did not preempt a state law. There, failure to review immediately would have eroded the federal policy in favor of enforcing agreements to arbitrate. *Id.*; *see also Local 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542 (1963) (final state court decision on whether a dispute is within exclusive power of the National Labor Relations Board). No similar federal policy concern exists here, where the Colorado Supreme Court's decision allows the issue to be raised by Petitioner later in the case. *See* Pet. App. 21 n.5. In fact, if issues of personal jurisdiction on motions to dismiss at the pleading stage fit the fourth *Cox* exception, then the exception would swallow the rule.

D. The Remaining Cases Cited by Petitioner in its Statement of Jurisdiction are Distinguishable

Aside from *Cox*, Petitioner cites two cases in support of its argument for jurisdiction in this Court, *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549 (2017) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). Both are distinguishable.

In *BNSF* there were two separate cases concerning general jurisdiction over BNSF in Montana. 137 S. Ct. at 1554. BNSF moved to dismiss both suits for lack of personal jurisdiction, and its motion was granted in one case and denied in the other. *Id.* After consolidating

the two cases, the Montana Supreme Court held that Montana courts possess *general* personal jurisdiction over BNSF. *See Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 9 (Mont. 2016). Unlike the case at bar, the Montana Supreme Court's decision foreclosed BNSF from raising the issue at later points in the litigations, as the decision was conclusive that Montana courts had general jurisdiction over BNSF, and it could be sued in Montana with respect to matters unrelated to that state. *See id.* Such is not the case here, as the Colorado Supreme Court's decision is not conclusive as to jurisdiction over Petitioner and certainly does not stand for the proposition that there is conclusively general jurisdiction and that Petitioner can be sued in Colorado in any dispute. *See* Pet. App. 21 n.5.

In *Brown*, the issue also concerned general personal jurisdiction, this time over foreign subsidiaries of The Goodyear Tire and Rubber Company (the North Carolina Court of Appeals had determined the North Carolina courts lacked specific jurisdiction over the subsidiaries but held that general jurisdiction was proper). *See* 564 U.S. at 919-20. Again, the underlying appeals in *Brown* were conclusive as to general jurisdiction and did not merely hold that a prima facie showing of specific jurisdiction had been made. *See generally Brown v. Meter*, 681 S.E.2d 382, 388 (N.C. App. 2009).

The decisions in *BNSF* and *Brown*, unlike the case at bar, did not include rulings subject to further state court review. Horizon is not aware of any case where this Court has exercised jurisdiction to review a state

court ruling that addresses the sufficiency of allegations of personal jurisdiction, but where the defendant retains the right to renew a challenge to personal jurisdiction at a later point in the litigation. The *J. McIntyre* case is instructive here. There, the trial court initially dismissed for lack of personal jurisdiction and a New Jersey intermediate appellate court reversed and remanded to allow discovery as to jurisdictional facts. *See Nicastro v. McIntyre Mach. America, Ltd.*, 987 A.2d 575, 578 (N.J. 2010). The defendant did not seek certiorari after the first decision. Instead, it engaged in discovery and renewed its challenge at the trial court level. *See id.* at 579. It was only after the New Jersey Supreme Court reviewed the second decision – a decision that finally asserted personal jurisdiction based on a developed record – that the defendant sought certiorari and this Court granted review. *See generally J. McIntyre*, 564 U.S. 873.

Granting certiorari at this stage would result in piecemeal review of a state court ruling on personal jurisdiction at the pleading stage, before state court remedies are exhausted. Because the state court decision is not a final judgment, this Court lacks jurisdiction to grant the writ. The Court should therefore deny the Petition.

II. The Procedural Posture of the State Court Action and the Incomplete Record Make This Case a Poor Candidate for Determining Widespread Issues of Personal Jurisdiction

The jurisdictional decision was determined at the trial court level on a motion to dismiss under Colo. R. Civ. P. 12(b)(5). Because the motion to dismiss was determined on documentary evidence, Dr. Boustred needed only to make a prima facie showing that personal jurisdiction was proper to defeat the motion to dismiss, and the trial court accepted the uncontroverted assertions contained in the complaint as true and resolved otherwise disputed issues in Dr. Boustred's favor. Pet. App. 48.

Although Dr. Boustred and Horizon were able to depose representatives of U.S.-based distributors of Petitioner's products, there was no discovery on Petitioner, which is located in Taiwan. Thus, there is a very incomplete record before this Court, as there have been no disclosures or discovery from the party with the most information on the jurisdictional question.

Granting the Petition to review nonfinal rulings would advance a poor vehicle for determining widespread issues of personal jurisdiction, which clearly will affect countless cases going forward. For example, there is nothing in the record showing how many units Petitioner shipped to its U.S.-based distributors or what amount of revenue Petitioner realized in its sales to U.S.-based distributors. There is also nothing in the

record showing how many of Petitioner's units were ultimately sold to retailers or consumers in the State of Colorado.[3]

Additionally, although Petitioner argues there is no evidence it targeted the State of Colorado, the trial court was presented with evidence of occasions in which Petitioner facilitated the sale of its products to customers in Colorado, by referring Colorado retailers directly to one of Petitioner's U.S.-based distributors for potential sales of Petitioner's products.[4] In both cases, the customers stated they were located in Colorado. In one case, Petitioner's representative even stated to the Colorado retailer, "We do welcome you to sell align [*sic*] products. And in order to save your delivery cost and time, please contact with [*sic*] our distributor in USA for further purchasing." Although these particular referrals took place after the subject incident, they directly refuted the sworn affidavit of Petitioner's manager, which post-dated the referrals and wrongly stated that Petitioner does not authorize, approve, or endorse the distribution of its products within Colorado.

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[3] The evidence reflected that Horizon, one of four U.S.-based distributors, sold $4,911,143 of Petitioner's products throughout the U.S., including sales of Petitioner's products in Colorado amounting to $355,107.57.

[4] These communications were produced by the U.S.-based distributor Align Aerial, pursuant to a subpoena duces tecum, as that distributor and Petitioner's personnel were included on the email chain.

Petitioner's directly referring Colorado customers to its distributor would certainly qualify as authorizing, approving, and endorsing the distribution of its products to Colorado. Horizon suspects there are other communications directly between Petitioner and Colorado consumers or retailers which predate the accident; however, Dr. Boustred and Horizon have not had the chance to propound discovery directly on Petitioner to obtain direct communications between Petitioner and potential Colorado customers.

The trial court was also presented with evidence showing that consumers can order Petitioner's products directly from Amazon.com to Colorado, and such orders are "shipped from and sold by Amazon.com." Because the parties have not had the opportunity to propound discovery on Petitioner, it is unknown whether Petitioner has a distribution contract with Amazon.com or by what arrangement Amazon.com directly sells Petitioner's products to the State of Colorado.

Due to the incomplete record and the procedural posture of the case, any decision will be based on the limited documentary evidence and allegations of Dr. Boustred's complaint and will turn on whether Dr. Boustred made a prima facie showing of jurisdiction. This low threshold will offer little guidance to future courts in their attempts to address the personal jurisdiction question in a product liability context.

In contrast, a record after additional discovery can show the quality and degree of contacts between

Petitioner, its distributors and affiliates, and the forum state. Even if the Court has jurisdiction, it will take a great risk in granting review prior to such discovery. *See generally* 4 Charles Alan Wright *et al.*, Fed. Prac. & Proc. Civ. § 1067.4 (4th ed. 2015) (a "factual record in any given case is likely to be particularly important" to analysis of personal jurisdiction involving stream-of-commerce, and parties "would be wise to seek all relevant discovery regarding the jurisdiction question"); *see also Minnick v. Cal. Dep't of Corr.*, 452 U.S. 105, 127 (1981) ("[W]e should not address the constitutional issues until the proceedings in the trial court are finally concluded and the state appellate courts have completed their review of the trial court record"); *Ariz. v. Maricopa County Med. Soc.*, 457 U.S. 332, 358 (1982) (J. Powell, dissenting) ("I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public").

Because the procedural posture of the state court action and the incomplete record make this case a poor candidate for determining widespread issues of personal jurisdiction, the Court should deny the Petition.

III. This Case is a Poor Vehicle Because the Allegations and Facts Presented to the Trial Court Supported a Prima Facie Showing of Jurisdiction Under the More Stringent Stream-of-Commerce Plus Test from *Asahi*

This case does not present a good vehicle for resolving the competing opinions in *Asahi* and *J. McIntyre*. The allegations and documentary evidence submitted to the trial court supported a prima facie showing that exceeded the "regular and anticipated" flow of commerce envisioned by Justice Brennan in *Asahi* as sufficing to assert personal jurisdiction and met Justice O'Connor's additional requirement of conduct showing intent to serve the forum state's market. Therefore, the prima facie showing of jurisdiction would be made whether or not this Court agrees with the Colorado Supreme Court's analysis and the outcome would remain unchanged.

In *Asahi*, the Court issued a fractured opinion addressing the stream-of-commerce theory. All justices agreed that, given the facts of that case, traditional notions of fair play and substantial justice prevented the assertion of personal jurisdiction. *See* 480 U.S. at 116, 121-22. However, they differed on the proper analysis for the showing of minimum contacts required to show that a defendant had purposefully availed itself of the forum market. *See id.* at 111-12, 116-17.

Justice O'Connor wrote for four justices and concluded that placing a product into the stream-of-commerce, without more, was insufficient to establish

personal jurisdiction even if the defendant knew that the product may or will enter the forum state. *See id.* at 112. In Justice O'Connor's view, the mere placement of a product into the stream-of-commerce did not necessarily show an intent by a manufacturer to serve a particular market. *Id.* Instead, there must be some additional conduct of the defendant that showed such an intent. *Id.*

Justice Brennan also wrote for four justices, explaining that the stream-of-commerce theory showed a defendant's purposeful availment of a market because it "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117. Justice Brennan would thus find purposeful availment of a forum where a defendant "is aware that the final product is being marketed in the forum State." *Id.*

The fragmented decision in *J. McIntyre* also reflected competing views of the stream-of-commerce test. Justice Kennedy wrote for the plurality that the principal inquiry "is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must 'purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " 564 U.S. at 882 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (alterations in original). The plurality then concluded that "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general

rule, it is not enough that the defendant might have predicted that its goods will reach the forum State." *Id.*

Justice Breyer did not agree with the rule proposed by the plurality (and argued for by Petitioner), but rather held that *J. McIntyre* could be resolved by applying existing Supreme Court precedent:

> In my view, the outcome of this case is determined by our precedents. . . .
>
> None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court's previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream-of-commerce, fully aware (and hoping) that such a sale will take place. *See Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 111, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (opinion of O'Connor, J.) (requiring 'something more' than simply placing 'a product into the stream-of-commerce,' even if defendant is 'awar[e]' that the stream 'may or will sweep

> the product into the forum State'); *id.*, at 117, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (Brennan, J., concurring in part and concurring in judgment) (jurisdiction should lie where a sale in a State is part of 'the regular and anticipated flow' of commerce into the State, but not where that sale is only an 'edd[y],' i.e., an isolated occurrence); *id.*, at 122, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (Stevens, J., concurring in part and concurring in judgment) (indicating that 'the volume, the value, and the hazardous character' of a good may affect the jurisdictional inquiry and emphasizing Asahi's 'regular course of dealing').
>
> . . .
>
> I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

564 U.S. at 888-90.

Contrary to Petitioner's assertions, this case does not cleanly present the stream-of-commerce issue because the facts alleged here meet both tests advanced in *Asahi*. With regard to the minimum contacts analysis, the trial court properly ruled that Dr. Boustred's allegations were sufficient to make a prima facie showing that Petitioner committed a tort in Colorado:

> Colorado's long-arm statute, C.R.S. 13-1-124, grants personal jurisdiction over a non-resident

> defendant under several circumstances, including when a defendant commits any tortious act within Colorado. But, the tortious act and the injury do not need to both occur in Colorado to satisfy the long-arm statute; rather, the statute is satisfied if either occurs in Colorado. *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235-36 (Colo. 1992). Here, Mr. Boustred alleges that Align committed multiple torts, including negligence and strict liability. Moreover, Mr. Boustred asserts that the main helicopter rotor holder manufactured by Align, which purportedly suffered both design and manufacturing defects, injured him in Colorado when it failed.
>
> Accordingly, the Court finds that Mr. Boustred has made a prima facie showing that Align committed a tort in Colorado.

Pet. App. 49.

With regard to the due process element, the trial court ruled that Dr. Boustred had made a prima facie showing of jurisdiction, as the allegations and supporting documents showed that Petitioner injected a substantial number of products into the stream-of-commerce knowing that those products would reach Colorado *and* that Petitioner took steps to market its products in the U.S. and Colorado:

> The Court has elected to rule on the instant motion based solely on the documentary evidence submitted to the Court. As such, Mr. Boustred need only make a prima facie showing that the Court has specific personal

> jurisdiction over Align. Mr. Boustred's allegations and supporting documents show that Align injected a substantial number of products into the stream-of-commerce knowing that those products would reach Colorado. *Additionally*, Align allegedly took steps to market its products in the U.S. and Colorado. While Align submitted affidavits and other materials to counter Mr. Boustred's allegations, the Court must resolve any controverted facts in favor of Mr. Boustred. Thus, for the purposes of the instant motion, the Court finds that Align purposefully availed itself of Colorado, and that Mr. Boustred's injuries arose out of Align's contacts with Colorado. *See Etchieson v. Cent. Purchasing, LLC*, 232 P.3d 301 (Colo. App. 2010). Accordingly, Mr. Boustred has made a prima facie showing that an assertion of specific personal jurisdiction over Align does not offend the due process requirements of the U.S. Constitution.

Pet. App. 52-53 (emphasis supplied). Importantly, the trial court considered the "additional" steps Petitioner allegedly took after injecting a substantial number of products into the stream-of-commerce to "market its products in the U.S. and Colorado." *Id.* This additional conduct is the "plus" in the stream-of-commerce plus analysis. Thus, the allegations and facts submitted to the trial court were sufficient to make a prima facie showing of jurisdiction under the more stringent test from Justice O'Connor's plurality in *Asahi*. The outcome therefore would remain unchanged whether this

Court agrees or disagrees with the Colorado Supreme Court.

A number of other courts have deemed it unnecessary to decide which stream-of-commerce test prevails where jurisdiction would exist even under the most stringent interpretation of this Court's rulings. *See, e.g.*, *Polar Electro Oy v. Suunto Oy*, 829 F.3d 1343 (Fed. Cir. 2016); *In re Chinese Drywall Prod. Liab. Litig.*, 753 F.3d 521 (11th Cir. 2014); *Russell v. SNFA*, 987 N.E.2d 778 (Ill. 2013), *cert. denied*, 134 S. Ct. 295 (2013).

Petitioner attempts to liken the facts of this case to those in *J. McIntyre.* Although Horizon vehemently disputes that the facts in this case are similar to those in *J. McIntyre*, even with the undeveloped record before the Court, Petitioner's argument shows why this case is not a good candidate for resolving the competing stream-of-commerce theories. Given that *J. McIntyre* was decided only seven years ago (on a more complete record), there is nothing to suggest that if the Court grants certiorari in the present case, it will result in a majority opinion that resolves the split decisions in *Asahi* and *J. McIntyre*, especially given the incomplete record and the fact that Dr. Boustred needed only to make a prima facie showing of jurisdiction at the trial court level.

Furthermore, the allegations in Dr. Boustred's complaint and documentary evidence, construed liberally, as the trial court did in this case, satisfy either stream-of-commerce test from *Asahi*. This case is thus a deeply flawed vehicle for determining widespread

issues of personal jurisdiction, as this case would be nothing more than an advisory opinion. The Court should therefore deny the Petition.

IV. The Colorado Supreme Court's Decision Does Not Conflict with the Decisions of this Court

The Colorado Supreme Court properly applied a stream-of-commerce analysis, requiring that Petitioner's contacts be more than random, fortuitous, or attenuated. Such a test is consistent with this Court's decisions.

Petitioner and amici claim that the decision below runs contrary to this Court's precedent. Pet. 20-24; Amici Br. 10-13. Petitioner argues that its connection to the State of Colorado through distributors amounts to acts of third parties that cannot support personal jurisdiction over Petitioner. Pet. 20-24. Petitioner cites *Walden v. Fiore*, 134 S. Ct. 1115 (2014) for this proposition. Pet. 22-23. In *Walden*, this Court did not address the stream-of-commerce theory at all, but reaffirmed the principle that jurisdiction must be based on the defendant's connection with the forum as contrasted with "random, fortuitous, or attenuated" contacts made through a third party's connection with the forum. *Walden*, 134 S. Ct. at 1123.

Petitioner's argument misunderstands the stream-of-commerce theory, which has never been an avenue for avoiding the requirement that purposeful availment be based on the acts of the defendant; rather, the stream-of-commerce theory is a tool by which the

Court can determine that a defendant who is not physically present in a forum state nevertheless is purposefully seeking to take advantage of its markets. *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 297 (defendant who delivers its products into stream-of-commerce with expectation that it will be purchased in forum state seeks to take advantage of that market, even if indirectly); *accord Asahi*, 480 U.S. at 117 (Brennan, J., concurring). Thus, when a manufacturer places its products into the stream-of-commerce, knowing and intending that the regular chains of commercial distribution will bring the product to a particular market, it is seeking to serve that market and to avail itself of the benefits and protections of the market.

The stream-of-commerce theory is perfectly consistent with this Court's requirement that jurisdiction be based on acts of the defendant's purposefully availing itself of the subject market. Therefore, cases like *Walden* (a non-stream-of-commerce case which underscores the importance of a defendant's conduct) do not impact the continued validity of the stream-of-commerce principles.

The Colorado Supreme Court faithfully relied on and applied longstanding precedent in *World-Wide Volkswagen*, and applied this Court's later divided opinions conservatively by issuing a narrow decision based on the standard for addressing Petitioner's motion to dismiss at the pleading stage. The Colorado

Supreme Court's decision poses no conflict with the decisions of this Court.

The Court should therefore deny the Petition.

V. Petitioner Advocates for a Rule that Would Insulate All Non-Resident Manufacturers from Liability in the U.S.

Petitioner and amici advocate a rule that would effectively insulate all non-resident manufacturers from suit within a forum state – at least those manufacturers sophisticated enough to structure their businesses to avoid such suits. As held by the Colorado Supreme Court, "Adopting such a position would render foreign manufacturers immune from suit in the U.S. so long as they sell their products in the U.S. through separately incorporated U.S.-based distributors. Such a result would be inequitable, as it would allow foreign manufacturers to receive the substantial economic benefit from sales to the U.S. market without incurring resulting liabilities and costs." Pet. App. 21-22.

Petitioner's and amici's view of what constitutes an act of the defendant directed toward a forum state (and what constitutes unilateral acts of third parties) would allow sophisticated corporations such as Petitioner to choose for themselves whether and where they will be subject to lawsuits in the U.S.. However, as this Court held in *Burger King*, "where individuals 'purposefully derive benefit' from their interstate activities, it may well be unfair to allow them to escape

having to account in other States for consequences that arise proximately from such activities[.]" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985) (internal citation omitted).

It would be antithetical to this Court's precedent to allow a sophisticated foreign manufacturer who engaged the use of multiple U.S.-based distributors to sell its products in every state to escape liability simply because its marketing and sales efforts reflected a national focus rather than specific focus tailored to each state individually.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's request for writ of certiorari.

Respectfully submitted,

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